

ORIGINAL



0000035032

OPEN MEETING AGENDA ITEM

BEFORE THE ARIZONA CORPORATION COMMISSION

**COMMISSIONERS**

2005 NOV -3 P 2:12

JEFF HATCH-MILLER, CHAIRMAN

WILLIAM A. MUNDELL

MARC SPITZER

MIKE GLEASON

KRISTIN K. MAYES

AZ CORP COMMISSION

DOCUMENT CONTROL

IN THE MATTER OF DISSEMINATION OF  
INDIVIDUAL CUSTOMER PROPRIETARY  
NETWORK INFORMATION BY TELECOM-  
MUNICATIONS CARRIERS

Docket No. RT-00000J-02-0066

**Cox Arizona Telcom's Exceptions  
to the Recommended Opinion and Order  
and Related Proposed CPNI Rules**

Cox Arizona Telcom, L.L.C. (Cox) submits its exceptions to the Recommended Opinion and Order (ROO) and related Customer Proprietary Network Information (CPNI) rules. Although the ROO incorporates some minor changes to the Rules in response to comments provided by interested parties, the proposed rules as written remain both unnecessary and legally flawed. The record in this docket does not support a conclusion that the current federal CPNI rules (47 C.F.R. §§64.2001-2009 (adopted September 20, 2002)) are inadequate to protect CPNI of Arizona consumers. Nor does the record support the need for the proposed CPNI rules. Cox urges the Commission not to adopt additional Arizona-specific CPNI rules until it is clear that the current federal CPNI rules are inadequate.

**A. The Federal CPNI Rules Adequately Protect CPNI.**

Cox submits that the current federal CPNI rules provide adequate and appropriate protection for CPNI. The federal CPNI rules already require, for example, opt-in procedures before using CPNI for marketing non-communications services. Cox has followed the requirements set forth in the federal CPNI rules and is unaware of any of its customers having expressed displeasure with Cox's handling of CPNI, including the CPNI notice that is sent to Cox customers.

1           Moreover, reliance on the federal CPNI rules ensures consistency across the multiple states  
2 and jurisdictions that many telecommunications providers operate. Deviating from the federal  
3 CPNI rules requires telecommunications providers to expend additional funds and resources to  
4 ensure compliance with at least two sets of rules across the different jurisdictions wherein they  
5 operate. The costs associated with implementing and enforcing two distinct sets of CPNI rules can  
6 ultimately result in higher costs to consumers as carriers attempt to recover the cost of these  
7 additional requirements. Such deviation also creates quality control challenges due to the need to  
8 address different CPNI requirements in different states.

9           The sole instance cited by the ROO concerning inadequate CPNI protection involves an  
10 opt-out procedure used by Qwest in the fall of 2001 – before the current federal CPNI rules went  
11 into effect. Cox submits that the procedure used by Qwest in that instance would not necessarily  
12 comport with the current federal CPNI rules. The critical flaws in Qwest's 2001 opt-out procedure  
13 were the form of Qwest's notice and Qwest's inadequate operational support for the opt-out  
14 procedure. The ROO is silent on whether adherence to the current federal CPNI rules would have  
15 avoided the CPNI concerns raised in connection with Qwest's 2001 procedure.

16           In fact, the current federal CPNI rules adequately protect CPNI and the record in this  
17 docket supports that conclusion. Since the effective date of the federal rules in September of 2002,  
18 this Commission has received no complaints about specific CPNI misuse. *See* Staff's Notice of  
19 Filing Responses to Arizona Wireless Carriers (filed April 13, 2005); Comments of Arizona  
20 Wireless Carriers Group on Staff's Notice of Filing (filed April 25, 2005). Moreover, the  
21 numerous public meetings across the state did not reveal any instances of inadequate CPNI  
22 protection. The proposed CPNI rules are apparently intended to address a perceived, yet  
23 speculative need – not a significant and current state interest based on an evidentiary record.  
24 Certainly, consumers have expressed an interest in having their CPNI protected, but, as the record

1 reveals, the federal CPNI rules are providing that protection.<sup>1</sup> Given the lack of evidence of CPNI  
2 misuse since that time, the federal CPNI rules are more than sufficient to provide notice to  
3 consumers concerning the use of CPNI and to properly protect CPNI. There is no need for  
4 Arizona-specific CPNI rules at this time.

5 **B. The Proposed Rules Face Constitutional Challenges.**

6 The proposed rules contain a requirement to obtain affirmative verification from a  
7 customer of that customer's opt-out approval to use CPNI within a prescribed timeframe.  
8 Specifically, Rule 2108 requires that carriers must verify a customer's opt-out choice within one  
9 year of sending an opt-out notice. If that affirmative verification is not obtained within one year,  
10 carriers are no longer authorized to use, disclose, or permit access to that customer's CPNI. In  
11 effect, the rules propose a "delayed" opt-in methodology, not a true opt-out methodology. Cox  
12 submits the "delayed" opt-in methodology will be confusing to consumers and even more  
13 burdensome to carriers than a straightforward opt-in methodology, which courts have already ruled  
14 to be unconstitutional. *See US West v. FCC*, 182 F.3d. 1224 (10<sup>th</sup> Cir. 1999); *Verizon Northwest,*  
15 *Inc. v. Showalter*, 282 F.Supp. 2d. 1187 (W.D. Wash. 2003). As a result, Cox continues to believe  
16 that the Arizona CPNI rules would be subject to challenge on a similar basis.

17 **C. Proposed Amendments to Rules.**

18 Cox does not disagree with the notion that notification needs to be clear and  
19 understandable. Had Qwest's 2001 notification fulfilled that requirement, this Commission would  
20 not be discussing Arizona-specific CPNI rules. Up to that time, improper release of consumer's  
21

---

22  
23 <sup>1</sup> It is important not to confuse telemarketing and do-not-call list issues with appropriate protection of  
24 CPNI. Under federal law, CPNI does not include customer name, phone number or address. *See* 47 U.S.C.  
25 §222(e); *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of*  
26 *Customer Proprietary Network Information and Other Customer Information*, 13 FCC Rcd 12390, 12395-  
27 96 (1998). Existing federal and state telemarketing laws and related do-not-call registries already address  
the consumer concerns about telemarketing. *See, e.g.,* 15 U.S.C. § 6101 *et seq.*; A.R.S. § 44-1282; *Rules*  
*and Regulation Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC  
Rcd 14014 (2003); *Second Order on Reconsideration*, 20 FCC Rcd 3788 (2005); 47 C.F.R. 64.1200 *et*  
*seq.*

1 CPNI was not an issue. Since the Commission initiated this docket, improper release of  
2 consumers CPNI has not been a problem. The public outcry more than three years ago focused on  
3 the form of Qwest's actual notification to its customers and Qwest's difficulties associated with  
4 managing the phone lines assigned to receive the "opt-out" calls. However, since that time, the  
5 forms of notice and opt-out process used by carriers in Arizona pursuant to the federal CPNI rules  
6 have not created similar problems, as revealed by the lack of CPNI complaints and the lack of  
7 public comment on the issue at the numerous public comment sessions held throughout the state.  
8 If, in spite of this more-recent history, the Commission concludes that Arizona-specific CPNI  
9 rules should be adopted, *Cox requests that the Commission amend the Arizona CPNI rules by*  
10 *deleting Rules 2108, 2109 and 2110.* Such amendment would reduce potential constitutional  
11 challenges to the rules, yet at the same time preserve somewhat-enhanced notice requirements that  
12 would address issues related to those that arose with Qwest's 2001 procedure.

13 **D. Conclusion**

14 Arizona consumers are afforded substantial and meaningful protection for their CPNI  
15 through the existing federal CPNI rules which were developed and refined over several years and  
16 which have successfully provided protection for consumers nationally. The record is devoid of  
17 any need to adopt Arizona-specific CPNI rules to remedy existing CPNI problems not addressed  
18 by the federal CPNI rules. Moreover, adoption of Arizona-specific CPNI rules will only result in  
19 additional customer confusion and additional costs to carriers as they attempt to comply with two  
20 distinct sets of rules. Cox requests that the Commission refrain from adopting Arizona-specific  
21 CPNI rules unless and until the current federal CPNI rules are proven to be inadequate. The record  
22 in this docket simply does not support a conclusion that the federal CPNI rules are inadequate at  
23 this time.

1 RESPECTFULLY SUBMITTED November 3, 2005.

2 COX ARIZONA TELCOM, L.L.C.

3  
4 By 

5 Michael W. Patten  
6 ROSHKA DEWULF & PATTEN, PLC  
7 One Arizona Center  
8 400 East Van Buren Street, Suite 800  
9 Phoenix, Arizona 85004  
10 (602) 256-6100

11 Attorneys for Cox Arizona Telcom

12 ORIGINAL and 13 COPIES of the  
13 foregoing filed November 3<sup>RD</sup>, 2005, with:

14 Docket Control  
15 ARIZONA CORPORATION COMMISSION  
16 1200 West Washington Street  
17 Phoenix, Arizona 85007

18 COPIES of the foregoing hand-delivered  
19 November 3<sup>RD</sup>, 2005, to:

20 Chairman Jeff Hatch-Miller  
21 Arizona Corporation Commission  
22 1200 West Washington Street  
23 Phoenix, Arizona 85007

24 Commissioner William A. Mundell  
25 Arizona Corporation Commission  
26 1200 West Washington Street  
27 Phoenix, Arizona 85007

Commissioner Marc Spitzer  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Commissioner Mike Gleason  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

ROSHKA DEWULF & PATTEN, PLC  
ONE ARIZONA CENTER  
400 EAST VAN BUREN STREET - SUITE 800  
PHOENIX, ARIZONA 85004  
TELEPHONE NO 602-256-6100  
FACSIMILE 602-256-6800

ROSHKA DeWULF & PATTEN, PLC  
ONE ARIZONA CENTER  
400 EAST VAN BUREN STREET - SUITE 800  
PHOENIX, ARIZONA 85004  
TELEPHONE NO 602-256-6100  
FACSIMILE 602-256-6800

1 Commissioner Kristin K. Mayes  
2 Arizona Corporation Commission  
3 1200 West Washington Street  
4 Phoenix, Arizona 85007

5 Lyn A. Farmer  
6 Chief Administrative Law Judge  
7 Hearing Division  
8 Arizona Corporation Commission  
9 1200 West Washington Street  
10 Phoenix, Arizona 85007

11 Christopher C. Kempley, Esq.  
12 Chief Counsel, Legal Division  
13 Arizona Corporation Commission  
14 1200 West Washington Street  
15 Phoenix, Arizona 85007

16 Ernest G. Johnson  
17 Director, Utilities Division  
18 Arizona Corporation Commission  
19 1200 West Washington Street  
20 Phoenix, Arizona 85007

21  
22  
23  
24  
25  
26  
27  
By

